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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.

JAMES MAURICE JACKSON, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether a defendant can waive or toll the application of the Interstate Agreement on Detainers Act, 18 U.S.C Appx. Arts. I-IX, when no hearing is conducted in open court to determine whether good cause exists to toll its application.

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The petitioner, James Maurice Jackson, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on September 9, 1983.

OPINION BELOW

The opinion of the Court of Appeals is reported at 717 F.2d 1481 (4th Cir. 1983) and the relevant part of that opinion appears in the Appendix hereto. No opinion

was rendered by the District Court for the Eastern District of North Carolina, Raleigh Division; however its Order of September 28, 1982 appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on September 9, 1983. A timely petition for a rehearing was denied on November 14, 1983, and this petition for certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C Appx. Arts. I-V. These articles of the Interstate Agreement on Detainers Act are reproduced in full in the Appendix hereto. However, Article IV(c), the provision at issue in this case, reads as follows:

> In respect to any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open Court, the prisoner or his counsel being present, the Court having jurisdiction of the matter may grant any necessary or reasonable continuance.

STATEMENT OF THE CASE

On February 2, 1982, petitioner Jackson, along with five other persons, was indicted in the Eastern District of North Carolina for the offenses of conspriacy to possess with intent to distribute cocaine and use of a communication facility (telephone) in furtherance of that conspiracy. The United States brought Jackson to trial in North Carolina only after removing him from State custody in Florida, by filing a detainer on January 19, 1982, and, thus, causing a Writ of Habeas Corpus Ad Prosequendum to be executed on March 6, 1982. The 120-day time limitation of the Inter-

state Agreement on Detainer's Act (hereinafter IAD) began running on April 13, 1982, the date on which petitioner Jackson arrived in North Carolina.

Initially, the trial was set for May 24, 1982 with pre-trial hearings set to begin before the Magistrate on May 4, 1982. On May 7, 1982, the Clerk of the Court issued a memorandum to all counsel, advising of a continuance of the trial until June 21, 1982. No order was issued by the Court and no hearing addressing the IAD Act and its requirement for a "good cause" showing for a continuance was ever held in "open court."

On May 20, and 21, suppression hearings were held before the Magistrate. They were continued on June 10, 11, and 12, 1982 and were completed on June 21 through 22, 1982. At the close of the June 12, 1982 hearing, there was a discussion of the possibility of continuance of the trial between the Magistrate and counsel for Jackson because of the

failure of the Government to produce audible tapes of the wiretaps at issue. However, no motion for a continuance was granted; nor was the issue of the IAD time limitation discussed or considered in any way.

In an order dated June 16, 1982, a District Court Judge, who was not the trial judge, continued the case on the motion of co-defendants Provost, Brumgardner, and Hines. The IAD Act time limitation was not mentioned in the Order and no "open court" hearing on the issue of a continuance was held prior to the issuance of the June 16, 1980 Order. No motion for a continuance was filed by petitioner Jackson and, significantly Jackson was not included in the Order.

At the close of the final pre-trial hearing on June 22, 1982, there was more discussion between the various counsel, the Magistrate and the Clerk of the Court re-

garding a date for trial. No definite trial date was set although it appeared that scheduling conflicts of a number of counsel, including Jackson's, would prevent the scheduling of trial in the July 19, 1982 criminal session of the Court. The Magistrate suggested to the Clerk that she might set an August trial date. Again, there was no mention or discussion of the IAD Act and its time limitation. There was no "open court" hearing on whether good cause existed for a continuance under the IAD.

In a memorandum to all counsel dated July 22, 1982, the Clerk of the Court stated that the trial would be postponed until August 23, 1982, "in order to accomodate counsels' conflicts and to allow the Court time to complete other criminal matters." Once again, no "open court" hearing addressing the IAD limitation was ever held.

The trial in this case finally commenced on August 24, 1982, a full thirteen days beyond the 120-day limitation imposed by the IAD Act. Accordingly, on the first day of trial, counsel for Jackson made a motion to dismiss, with prejudice, the charges against Jackson. The motion was later denied, and petitioner Jackson was tried and convicted of the two offenses.

In denying petitioner Jackson's motion to dismiss because the 120-day limitation of the IAD Act had run, the District Court, in its Order dated September 30, 1982, held as follows: 1) that the forty-seven (47) day period taken up in disposing co-defendants' (including Jackson) Motion to Suppress was excludable from the 120-day limitation; (2) that petitioner Jackson's (alleged) Motion for a Continuance (which was not considered or granted) met the good cause requirement for delay set forth in the Act; (3) that "the time for con-

sideration of all motions made or joined by (Jackson) had the effect of providing the 'good cause' requirement for delay." (emphasis in original); and (4) that the Act does not mandate an automatic dismissal upon passage of the prescribed time period but rather permits the Court to "determine whether the delay is inconsistent with and frustrates the purposes of the Act."

A timely appeal was entered with the Fourth Circuit Court of Appeals, which, in its opinion dated September 9, 1983, affirmed the District Courts denial of petitioner Jackson's Motion to Dismiss. The Fourth Circuit Court of Appeals, did not decide the contested issue of whether petitioner Jackson had actually moved for a continuance but affirmed the trial Court Order on other grounds. Citing its decision in United States v. Odom, 674 F.2d 228 (4th Cir. 1982), cert. denied, 457 U.S. 1125 (1983), the Fourth Circuit Court concluded that "a de-

fendant waives the 120 day limitation by requesting to be treated in a manner inconsistent therewith". . . and that the "period excluded under the Speedy Trial Act, 18 U.S.C. § 3161(h)(1)(F) (e.g., period from filing to disposition of pretrial motions) likewise should be excluded under the IAD." 717 F.2d, 1486. Accordingly, the opinion directly below held that in joining co-defendants' Motion to Suppress the Wiretap Evidence, Jackson "must be deemed to have waived the 120-day limitation." Id. at 1487. The Fourth Circuit Court of Appeals also found that by seeking an additional ten days to submit memoranda (at the June 21 through 22, 1982 hearings) and by indicating that a July 19, 1982 trial date was unsatisfactory, Jackson's counsel was seeking a continuance that would toll the 120-day limitation. At no point did the District Court Order of September 28, 1982 or the Opinion below address the Act's requirement that a contin-

uance be granted only when good cause is shown in open court.

Petitioner Jackson, sought a rehearing en banc, arguing that an examination of the record indicated that petitioner Jackson's counsel disavowed any intention of obtaining a continuance and that at no point in any of the pre-trial proceedings was any hearing conducted on the issue of good cause for a continuance under the Interstate Agreement Act. The Court denied rehearing on November 14, 1983, with no opinion entered.

REASONS FOR GRANTING THE WRIT

This case raises a fundamental issue regarding the continued enforcement and effectiveness of the Interstate Agreement on Detainers Act (hereinafter IAD); namely, whether a defendant can waive or toll the application of the 120-day limitation when no hearing is conducted in open court to determine whether good cause exists to toll its application. In engaging in post hoc

determinations that defendant Jackson constructively waived his right to a trial within 120-days, both the trial court and the court below have ruled in a manner clearly inconsistent with the plain language and strict procedural requirements of the Act. The Act requires an open court showing of good cause as to whether the time limit should toll. No such hearing was held in the case at bar and this issue was not addressed by the trial court or the court below. Instead, the courts below have held that certain events and or conduct on the part of defense counsel can constitute a waiver or tolling of the 120-day limitation. Specifically, the opinion below held that by joining in pre-trial motions, requesting time to submit memoranda, and indicating his unavailability for trial on a certain date, defense counsel waived the right to a trial within the 120-day period.

Important questions are presented, therefore, with regard to the meaning, purpose and

application of the IAD Act. While these questions have not been definitely resolved, it is petitioner's view that the opinion below clearly conflicts with the requirements of the Act, and the intent of Congress. At stake is the future applicability of a Congressionally created procedural requirement and the right of an accused to be tried within the statutory period so as not to disrupt the rehabilitative process. The questions presented by this petition must be resolved by this Court in order to clarify the requirements of the Act, to ensure that the Congressional purpose is effected and to give notice to future defendants as to what actions will or will not preserve their rights under the Act. Finally, the statutory question at issue here is one that will recur frequently and will involve litigation around the issue of waiver until it is finally resolved by this Court.

ARGUMENT

The Interstate Agreement on Detainers Act (IAD) establishes a very strict and specific time limitation for trial of prisoners taken from confinement in other jurisdictions. The IAD explicitly provides that, if trial is not held within 120 days of the date the prisoner arrives in a receiving State, the charges are to be dismissed with prejudice. 18 U.S.C. Appx. Art. IV(c) and V(c). Unlike the Speedy Trial Act, 18 U.S.C. §3161, et seq., the IAD contains no list of automatic tolling provisions; rather it contains a unique, detailed procedure which must be followed if the trial is to be continued beyond the time specificed in the Act. The Act states, in relevant part as follows:

> [B]ut for good cause shown in open Court, the prisoner or his counsel being present, the Court having jurisdiction of the matter may grant any necessary or reasonable continuance.

18 U.S.C. Appx. Art. IV (c).

The issue in this case is whether the statutory provisions are to be applied as they read or whether the 120-day limitation can be waived by some other means. Clearly, the judicial interpretation of the Act, as announced in the opinion below, conflicts with the express language of the Act. The statute makes no allowance for an implied waiver or constructive tolling of the time limitation. The argument for the petitioner, then, follows the straightforward language of the Act and can be stated quite succinctly: a defendant must be tried within the 120-day period unless a showing of good cause for a continuance is made in open court.

In the instant case, petitioner's trial was continued on a number of occasions and for various reasons. The Government and the petitioner are in disagreement regarding the role of petitioner's counsel in delaying the trial date. It cannot be disputed, however, that no hearing was ever

held which specifically addressed the IAD Act and whether good cause existed for a continuance under the IAD. Indeed, this fact is implicit in the lower Court's ruling that petitioner waived the application of the IAD and/or that the IAD limitation was otherwise tolled.

In affirming Jackson's conviction, both the trial court and the court below failed to undertake a meaningful analysis of the Act and, instead, engaged in post hoc rationalizations for the Government's delay in not bringing defendant to trial within 120 days. The obvious flaw in the reasoning is that the Act does not permit the Courts to engage in after-the-fact surmizing of good cause(s) for delay. It requires, clearly and explicity, that any good cause be shown in open court prior to the granting of a continuance, so that a defendant is given the opportunity to assert his rights under the Act and to rebut any reasons for the delay. United

States v. Odom, 674 F.2d. 228 (4th Cir. 1982), cert. denied, 457 U.S. 1225 (1983). The Act recognizes that a hearing in open court, accompanied by argument and a finding of good cause, is the only practicable and fair means by which the time limit can be tolled.

In affirming the trial Court's denial of petitioner Jackson's Motion to Dismiss, the Court below ignored the explicit requirements of the Act and focused instead on the issue of waiver. In so doing, it relied almost exclusively on its decision in United States v. Odom, supra, when it held that "a defendant waives the 120-day limitation by requesting to be treated in a manner inconsistent therewith... and that "periods excluded under the Speedy Trial Act... (e.g. periods from filing to disposition of pretrial motion) likewise should be excluded under the IAD." United States v. Hines, 717 F.2d 1481, 1486, (4th Cir. 1983).

In Odom, the request to be treated in a manner inconsistent with the IAD occured

when Odom's trial counsel, in chambers, affirmatively asked for and consented to a continuance and when he entered into plea negotiations prior to trial. According to the court, this affirmative request to be treated in a manner contrary to the procedures of the IAD was sufficient to constitute a waiver.

The facts of the case at bar present questions that were not present in Odom and demonstrate conclusively that the "waiver analysis" creates more problems than it solves. Unlike the defendant Odom, petitioner Jackson never requested or consented in open court to a continuance. One might well ask whether actions such as requests for time to submit memoranda, joining in pretrial motions, and indicating difficulties with certain trial dates, rise to the level of affirmative requests to be treated in a manner inconsistent with the Act. It is this "second guessing" as to what constitutes a waiver or what actions

are inconsistent with the Act that the Act itself was designed to prevent. This kind of post hoc judicial analysis invites litigation and presents the danger of the exception swallowing the rule. The wisdom of the Act is that it provides a "bright line" standard and seeks to resolve these problems in a structured fashion in open court prior to trial.

Another major problem with the waiver exception is that it forces a defendant to preserve certain rights (e.g. discovery, trial preparation) at the cost of the right to a trial within 120 days. If the defendant is required to waive this right, he should be given notice prior to trial so that he can plan his defense accordingly. He should also be given the opportunity to rebut any assertion that good cause exists for a delay of the 120-day period. Stated simply, the defendant needs to know that he risks waiving the right before that right is actually lost. Again, the Act provides a resolution to this problem through the good cause, in open court

requirement. One's IAD rights cannot be lost or waived unless and until the continuance issue is raised and argued in open court and a finding of good cause is made.

The rule in Odom that behavior inconsistent with the Act constitutes a waiver is fatally flawed; It is unworkable, invites litigation, it hinders preparation for trial and it is contrary to the express language of the Act. Therefore, Odom must either be strictly limited to its facts or overruled. Insofar as the decision below relies on this holding of Odom, it should be reversed.

The court below also relied on a second holding of Odom that periods excluded under the Speedy Trial Act, 18 U.S.C. § 3161 (h)(1)(F) (e.g. period from filing to disposition of pretrial motion) likewise should be excluded under the IAD. There is nothing in the IAD providing a basis for such an interpretation, and a simple comparison of the language and purposes of the respective

statutes demonstrates the court erroneously read into the IAD an automatic waiver provision that isn't present.

Section 3161(h) of the Speedy Trial Act provides for specific periods of delay which are to be excluded in computing the time within which a trial must commence. No such provisions are contained in the IAD Act. If Congress had intended to exclude certain periods from the IAD time computation it would have inserted similar language in the Act. See United States v. Rutherford, 442 U.S. 544 (1979), Anderson v. Wilson, 289 U.S. 20 (1933).

The Odom court also concluded the two Acts "deal with the same subject matter" and have the "same purpose" Odom at 231. Herein lies the major flaw in the court's construction of the IAD Act. Unlike the Speedy Trial Act, which deals with the right to be tried quickly, the IAD creates a separate and independent right to be tried within a

period so as not to disrupt the rehabilitative process or subject the prisoner to too many burdens prior to trial. Given the fact that the IAD involves this separate purpose and contains no provisions for excludable time periods, it is inappropriate to read into it the automatic waiver provisions of the Speedy Trial Act. Thus, a pre-trial motion tolls the computation of the Speedy Trial Act but does not, in the absence of an open court hearing on point, toll the computation of the IAD time limitation.

In the pre-trial period below, the burden was clearly on the Government to raise the issue and to have it addressed by the defendant and the Court. As this Court made clear in United States v. Mauro, 436 U.S. 340 (1978) there was no obligation for a defendant to raise explicitly a detainer Act violation. In Mauro, this Court held:

> We agree with the Court of

> Appeals in No. 77-52, that Respondent Ford's failure to invoke the Agreement in specific terms in his speedy trial motion before the District Court did not result in a waiver of his claim that the Government violated Article IV(c)." Id. at 364.

The decision of the court below that certain actions constitute a waiver or tolling of the IAD time limitation is clearly at odds with the purpose, and express provisions of the IAD Act. In so construing the Act, the decision all but destroys the open court, good cause showing requirement as well as the purpose of the Act. In the case at bar, the Government could have attempted to toll the limitation of the IAD Act by raising the issue in open court prior to any continuance and by requesting good cause be found. Because of its failure to do so, the court below engaged in a complicated and unauthorized waiver analysis that has no foundation in law. The defendant cannot be penalized for asserting his rights

under the Act and cannot be deprived, post facto and without a hearing, of his opportunity to rebut the claim that the time limitation of the Act was waived or tolled.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America, Appellee,

v.

Ronald Doyle HINES, Appellant.

UNITED STATES of America, Appellee,

v.

Gary J. PEED, Appellant.

UNITED STATES of America, Appellee,

v.

Teresa ELEAZAR, Appellant.

UNITED STATES of America, Appellee,

v.

James Maurice JACKSON, Appellant.

UNITED STATES of America, Appellee,

v.

James C. CODDINGTON, Appellant.

UNITED STATES of America, Appellee,

v.

Jeffrey Craig BUMGARDNER, Appellant.

Nos. 82-5274(L), 82-5275 to 82-5278 and 82-5286.

United States Court of Appeals,

Fourth Circuit.

Argued July 14, 1983

Decided Sept. 9, 1983.

II.

The Interstate Agreement on Detainers Act ("IAD") provides that if trial is not held within 120 days of the date a prisoner arrives in a receiving state, the charges are to be dismissed with prejudice. 18 U.S.C. Appx. Arts. IV(c), V(c). The running of the 120-day limitation, however, may be tolled by the district court "for good cause shown in open court, the prisoner or his counsel being present." Id.

The government brought Bubba Jackson to North Carolina for trial from Florida, where he was in custody, by detainer. The 120-day limitation began running on April 13, 1982, the date Jackson arrived in North Carolina. See United States v. Bryant, 612 F.2d 806, 810-11 n. 7(4th Cir.), cert. denied, 446 U.S. 920, 100 S.Ct. 1855, 64 L.Ed.2d 274 (1980). The trial commenced on August 24, 1982, 133 days later. The parties dispute whether the running of the 120-day limitation period was tolled for at least 13 days.

In United States v. Odom, 674 F.2d 228, 230 (4th Cir.), cert. denied, 457 U.S. 1125, 102 S.Ct. 2946, 73 L.Ed.2d 1341 (1983), this court held that a defendant waives the 120-day limitation by requesting to be treated in a manner inconsistent therewith. The Odom court also held that the periods excluded

under the Speedy Trial Act, see 18 U.S.C. § 3161(h)(1)(F) (e.g., period from filing to disposition of pretrial motion) likewise should be excluded under the IAD. Thus, the government seeks to exclude all days from the filing of pretrial motions to the prompt disposition of those motions, since on April 26 Jackson moved the court to allow him to adopt the motions of his co-defendants. Hearing alone on these pretrial motions took 16 days (May 20-31, June 11-12, June 21-22). Indeed, in rejecting Jackson's motion for dismissal under the IAD, the district court found that Jackson's joining in the motion to suppress the wiretap evidence, without more, amounted to a waiver of the 120-day limitation.

Of critical importance in the instant situation are defendant Jackson's motion to suppress evidence seized as a result of various electronic surveillances.

Had the motion to suppress been allowed, it is doubtful that the government could have proceeded to trial since its case was based almost entirely upon this evidence. At least forty-seven days were required by the Magistrate to consider fully and make a recommendation concerning these motions to suppress. Since the trial commenced thirteen days after the running of the 120-day limitation, the 47-day delay caused by defendant Jackson's motions to suppress provides sufficient justification for the denial of defendant Jackson's motion to dismiss based upon the Interstate Agreement on Detainers.

The government also lists several continuances (i.e., requests to be treated inconsistently with the IAD) granted at Jackson's request: (1) at the request of Jackson's attorney, a pretrial hearing was delayed three days from June 7 to June 10; (2) the June 10-12 hearings were

continued nine days until June 21 at the request of all attorneys, including Jackson's; (3) at Jackson's attorney's request, defense counsel were given ten days, from June 22 until July 2 to file additional memoranda; and (4) Jackson's attorney, as well as other defense counsel, indicated that the clerk's suggested trial date of July 29 was not satisfactory, and the trial eventually was set for August 16.

Jackson attacks the government's assertion that he sought continuances. He cannot, however, rebut the government's claim that he sought an additional ten days to file memoranda or that he indicated that a July 19 trial date was unsatisfactory. Furthermore, even without considering the continuances, Jackson must be deemed to have waived the 120 day limitation by joining in the co-defendants' motions, especially the motion to suppress the wiretap evidence.

It is not surprising that Jackson was held beyond 120 days given defense counsel's extensive pretrial motions. Jackson joined in those motions, which took a substantial amount of time to resolve, and then surprised the district court by moving for a dismissal under the IAD on the first day of trial. Jackson sought to benefit from the pretrial motions which necessarily resulted in delays, and cannot now claim that he is aggrieved under the IAD by those delays.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 82-8-CR-5

UNITED STATES OF AMERICA

v. ORDER

JEFFREY CRAIG BUMGARDNER,
et al.

Defendants were charged in a multiple count indictment with intentionally combining and conspiring to violate the laws regulating a Schedule II controlled substance and with using a telephone to facilitate a conspiracy to violate the drug laws. See 21 U.S.C. §§ 846 & 843(b) 1976. On 24 August 1982, as jury selection began in the trial, defendant Jackson moved for a dismissal alleging a violation of the Interstate Agreement on Detainers. 18 U.S.C. App. § 2. Ruling was deferred on this motion allowing further time for careful consideration of this question. The issue is now ready for ruling.

The United States Marshal Service filed a detainer against defendant Jackson with the Sheriff of Duval County, Florida, on 19 January 1982. He was taken into custody by the United States Marshal, who began transporting him to North Carolina, where he arrived on 13 April 1982. His arrival in this state triggered the running of the 120-day time limitation which lies at the heart of this motion. United States v. Bryant, 612 F.2d 806, 810-11 n.7 (4th Cir. 1979), cert. denied, 446 U.S. 920 (1980). The Interstate Agreement on Detainers directs that "trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state. . ." 18 U.S.C. App. § 2 (Art. IV(c)). The trial in this action commenced on 24 August 1982, thirteen days beyond the 120-day limit imposed by Article IV(c), placing the time

limitation imposed by the Interstate Agreement on Detainers directly in issue.

The gist of the matter before the Court concerns the appropriate application of the 120-day limitation. Specifically, the Court must determine how rigidly to apply this provision. Such a determination necessitates inquiry into several areas. First, the procedural posture of this case must be examined with a critical eye toward the pre-trial motions filed by defendants. Second, the Court must analyze Article IV of the Interstate Agreement on Detainers, both from the standpoint of the legislative purpose behind the Act and prior interpretations thereof by other courts. Finally, the interplay between the procedural aspects of this case and the legal ramifications of the Act must be considered in light of the interest of justice.

From the outset, this case has been wrought with various pre-trial motions, among them being two intricate motions to suppress evidence seized as a result of electronic surveillance, various motions to dismiss, and motions for severance. The United States Magistrate conducted lengthy hearings on many of these motion and filed various memoranda and recommendations. In addition to the time required for the Magistrate to conduct the hearings, consider the evidence, contentions and law, and make his recommendations, this Court required additional time to review the matters in light of the numerous objections filed by all defendants. Defendant Jackson shares some responsibility for these time requirements since he filed a motion to join all co-defendants' motions on 26 April 1982.

Another important procedural consideration were the motions to continue filed by defendants Hines, Provost, Peed and Bumgardner which were allowed by order of Chief Judge Franklin T. Dupree of this Court. Judge Dupree specifically found that the time between the date of the continuance and the date upon which the trial commenced was excludable under the Speedy Trial Act. See 18 U.S.C. § 3161 (h)(8)(A)(1976). The Court considers it extremely important that defendant Jackson not only joined in the various motions to continue by virture of his motion to join in all co-defendants' motions, but also by his oral motion for a continuance of the trial. With the defendant present, his attorney moved for continuance in open court on 12 June 1982 before the United States Magistrate "on behalf of defendant Jackson." Tr. of Hearing on Motion to Suppress, at 506.

The Interstate Agreement on Detainers signifies a congressional purpose aimed at preventing unusual delays which could result from a prisoner being taken from custody in one state and held in another state while awaiting trial. This interruption of incarceration impedes the process of rehabilitation. Accordingly, the Act was designed to encourage the expeditious disposition of charges against transferred prisoners and to provide cooperative procedures to facilitate such disposition. United States v. Mauro, 436 U.S. 340, 351 (1978). Upon his transfer to a receiving state, the prisoner "must be brought to trial on the charges underlying the detainer within 230 days of his arrival. Again, if the prisoner is not brought to trial within the time period, the charges will be dismissed with prejudice, absent good cause shown." Cuyler v. Adams, 449 U.S. 433, 444 (1981) (dictum). Although

the Supreme Court noted the mandatory nature of the provisions of Article IV in Cuyler, the consideration was merely a dictum statement since that case dealt soley with the issue of whether a prisoner was entitled to a pre-transfer hearing under the Interstate Agreement on Detainers. Id. at 544. The Act does provide that the 120-day limitation may be extended "for good cause shown in open court, the prisoner or his counsel being present. . . ." 18 U.S.C. App. § 2. When considering the direct application of this limitation, the Supreme Court paid particular attention to the fact that the defendant had

> persistently requested that he be given a speedy trial. After his trial date had been continued for the third time, he sought the dismissal of his indictment on the ground that the delay in bringing him to trial while the detainer remained lodged against him was causing him to be denied certain privileges at the

> state prison. We deemed these actions on (defendant's) part sufficient to put the Government and the District Court on notice of the substance of his claim.

Mauro, 436 U.S. at 364-65. The implication of this analysis suggests that a defendant may not stand mute in the face of continuances and then seek a dismissal when the 120-day limitation expires. Rather, he should exert efforts directly to encourage an expedient process. In the instant case, defendant Jackson first claimed a violation of the Act on 24 August 1982 when the trial commenced. Not only did he fail to object to the various motions for continuances by his co-defendants, but he also moved for a continuance himself in open court. These actions run directly counter to the judicially imposed notice requirement for Article IV(c).

In addition to the motions for continuance, various other pre-trial motions caused the delay in the commencement of

the trial. Specifically, various motions to sever the trials, to dismiss the charges, and to suppress evidence required lengthy hearings before a Magistrate and additional time for the District Court to review and rule on the recommendations pertaining thereto. This delay, directly attributable to defendants' motion practice to which defendant Jackson had notice and made no objection to the delay it would engender, and in which he both joined and caused, is excludable from the 120-day limitation. Foran v. Metz, 463 F.Supp. 1088, 1097 (S.D.N.Y.), aff'd, 603 F.2d 212 (2d Cir. 1979). The time limitation does not require a rigid and inflexible schedule, but stands "to prohibit ex parte and sua sponte continuances." United States v. Ford, 550 F.2d 732, 743 N.30 (2d Cir. 1977), aff'd, 436 U.S. 340 (1978). This protection afforded transferred prisoners is not violated by allowing extensions of the 120-day limitation when the

prisoner's own motions and actions create the need for this additional time. "Where a criminal defendant seeks an adjudication on an issue that would preclude a trial, he cannot thereafter argue that the time required to decide his claim should be held against the state for purposes of computing limitations of time." Foran, 463 F.Supp. at 1097. Of critical importance in the instant situation are defendant Jackson's motions to suppress evidence seized as a result of various electronic surveillances. Had the motion to suppress been allowed, it is doubtful that the government could have proceeded to trial since its case was based almost entirely upon this evidence. At least forty-seven days were required by the Magistrate to consider fully and make a recommendation concerning these motions to suppress. Since the trial commenced thriteen days after the running

of the 120-day limitation, the 47-day delay caused by defendant Jackson's motions to suppress provides sufficient justification for the denial of defendant Jackson's motion to dismiss based upon the Interstae Agreement on Detainers. Id. at 1098.

Defendant makes a persuasive argument that the 120-day time limit is both mandatory and automatic. See Ford, 550 F.2d at 745 (Moore, J., dissenting). However, the Court feels that the 120-day limitation will not avail him here for the reasons set forth above and summarized below:

(1) The motion of defendant's attorney on 12 June 1982 for a continuance in open court with the defendant being present specifically meets the "good cause" requirement for delay set forth in the Act. 18 U.S.C. App. § 2.

(2) The time for consideration of all motions made or joined by defendant had the

effect of providing the "good cause" requirement for delay.

(3) This Court does not interpret the Act as mandating an automatic dismissal upon the passage of the prescribed time period. Rather, the Court must determine whether the delay is inconsistent with and frustrates the purposes of the Act.

In conclusion, the Court feels that defendant should not be allowed to use the passage of a time limitation, designed to protect his process of rehabilitation, as a sword when the defendant himself has caused, or substantially contributed to, the extension of that time limitation. Accordingly, the motion to dismiss is denied.

AND IT IS SO ORDERED.

This 30 September 1982.

/s/ W. Earl Britt
W. EARL BRITT
United States District Judge

APPENDIX C

INTERSTATE AGREEMENT ON DETAINERS

Act Dec. 9, 1970, P. L. 91-538, §§ 1-8, 84 Stat. 1397, provided:

Sec. 1. This Act may be cited as the Interstate Agreement on Detainers Act".

Sec. 2. The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdiction legally joined in substantially the following form:

"The contracting States solemnly agree that:

"Article I

"The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of person already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and

the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

"Article II

"As used in this agreement:

"(a) 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"(b) 'Sending State' shall mean a State in which a prisoner is incarcerated at the

time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

"(c) 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

"Article III

"(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to

be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: Provided, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

"(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

"(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

"(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for

final disposition of all untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the State to which the prisoner's request for final disposition is being sent of the proceeding being inititated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force of effect, and the court

shall enter an order dismissing the same with prejudice.

"(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding comtemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving State to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending State. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph

shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

"(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

"Article IV

"(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: Provided, That the court having jurisdiction of such indictment, information, or complaint shall have duty approved, recorded, and trans-

mitted the request: And provided further, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

"(b) Upon request of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. Said authorities simultaneously shall furnish

all other officers and appropriate courts in the receiving State who has lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

"(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

"(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending

State has not affirmatively consented to or ordered such delivery.

"(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"Article V

"(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made

by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place of trial, whichever custodial arrangment may be approved by the custodian.

"(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

"(1) Proper identification and evidence of his authority to act for the State into whose temporary custody this prisoner is to be given.

"(2) A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been

lodged and on the basis of which the request for temporary custody of the prisoner has been made.

"(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

"(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations,

or complaints which form the basis of the detainer or detainers of for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

"(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State.

"(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the juris-

diction which imposed the sentence may allow. "(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

"(h) From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for,

keeping, and returning the prisoner. The provisions of this paragraph shall govern unless the States concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party State, or between a party State and its subdivisions, as to the payment of costs, or responsibilities therefor.

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Nos. 83-1138, 83-1155, 83-6086 and 83-6092

In the Supreme Court of the United States

OCTOBER TERM, 1983

GARY J. PEED and JAMES C. CODDINGTON, PETITIONERS

v.

UNITED STATES OF AMERICA

JAMES MAURICE JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

JEFFREY CRAIG BUMGARDNER, PETITIONER

v.

UNITED STATES OF AMERICA

TERESA ELEAZAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were deprived of their right to a fair trial because of a juror's unfounded suspicions about an event outside the courthouse that were dispelled by the district judge during an ex parte inquiry.

2. Whether petitioner Jackson was tried within the time limitation imposed by the Interstate Agreement on Detainers Act, 18 U.S.C. App. § 2, Art. IV(c).

3. Whether telephone calls monitored by state police officers with the consent of a participant were properly admitted in evidence in a federal trial.

4. Whether there was sufficient evidence to support petitioner Eleazar's conviction.

5. Whether Local Rule 19 of the United States Court of Appeals for the Fourth Circuit violates due process.

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (83-1138 Supp. App. 1a-18a) is reported at 717 F.2d 1481.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1983. A petition for rehearing was denied on November 14, 1983. The petitions for a writ of certiorari were filed as follows: No. 83-1138 on January 11, 1984; No. 83-6086 on January 12, 1984; and Nos. 83-1155 and 83-6092 on January 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, all petitioners were convicted on one count of conspiring to possess cocaine with intent to manufacture and distribute, in violation of 21 U.S.C. 846 (Count 1). Except for petitioner Eleazar, each petitioner was also convicted on one of several counts of using a communication facility to facilitate the conspiracy, in violation of 21 U.S.C. 843(b) (Counts 4-7) (83-1138 Supp. App. 3a).[1] Petitioners Peed, Coddington, and Jackson were sentenced to four-year terms of imprisonment on each count, with the sentences on the facilitation counts suspended in favor of a five-year term of probation to run consecutively to the term of imprisonment on the conspiracy count (C.A. App. 288, 291, 292). Petitioner Bumgardner was sentenced to five years' imprisonment on the conspiracy

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[1] Upon petitioners' motions before trial, an additional count (Count 2) charging conspiracy to possess marijuana with intent to distribute was severed.

count, all but six months of which was suspended in favor of five years' probation; his four-year sentence of imprisonment on the facilitation count was suspended in favor of a five-year probationary term, to run concurrently with the sentence on the conspiracy count (C.A. App. 294). Petitioner Eleazar was sentenced to a five-year term of imprisonment on the conspiracy count, all but six months of which was suspended in favor of five years' probation (C.A. App. 290).[2]

1. Testimony presented at trial by cooperating co-conspirators showed the existence of a two-tiered drug conspiracy. The first tier was centered in Apex, North Carolina, under the supervision of James "Jacques" Provost. Jacques' two investors or partners were petitioner Peed in Virginia and petitioner Coddington in Florida. The first tier employed three drug couriers, one of whom was petitioner Jackson, who shuttled drugs and drug cutting agents between the first tier and the second, smaller tier in Jacksonville, Florida. Petitioners Bumgardner and Eleazar (who was Jackson's sister and Bumgardner's girlfriend) were part of the second tier. 83-1138 Supp. App. 3a.

The testimony of the cooperating co-conspirators was amplified by the playing of numerous recorded

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[2] Ronald Doyle Hines, a co-defendant whose convictions on one count each of conspiracy and using a communication facility to facilitate that conspiracy were also affirmed by the court of appeals, was sentenced to the same sentence petitioner Bumgardner received (83-1138 Supp. App. 3a; C.A. App. 289). Of the four additional people indicted with petitioners, three (Donald Christopher Provost, Darryl Stephen Provost and Peter David Stisser) pleaded guilty prior to trial, and the charges against the fourth (Tina Pitts Provost) were dismissed on the government's motion. Darryl Provost and Peter Stisser testified for the government at trial.

telephone conversations among the conspirators. In these conversations, petitioner Peed discussed the quality, quantity, and types of cocaine by the use of coded terms (12 R. 178-186)[3] as well as the planned delivery to him of cocaine by Darryl Provost (12 R. 75-79). In another conversation, petitioner Coddington discussed with Jacques Provost cocaine quality, delivery dates, and quantity (12 R. 159-169); the next day, after Darryl Provost had been arrested with cocaine in Virginia, they discussed the arrest, the sale of land to raise funds for cocaine, and the amount of money needed to pay for the cocaine confiscated in Virginia (13 R. 81-92). Petitioner Jackson was recorded requesting Darryl Provost to bring him tools for treating cocaine (12 R. 104-105) and discussing the pickup of proceeds from cocaine sales (14 R. 147-148, 171-174, 188-194).

The participation of petitioners Bumgardner and Eleazar in the drug scheme was similarly evidenced by their recorded conversations. In a conversation with Jackson, petitioner Bumgardner discussed drug transactions using coded terms (14 R. 245-249). Later, after discussing "the weights and everything" (*ibid.*), Jackson determined from Bumgardner that certain scales were "triple beam" and told Bumgardner to "take that thing and make four of them out of it" (15 R. 10-11). The next day Jackson asked Bumgardner whether or not "they look like they're weighed out right," and Bumgardner indicated that he did only "2 G's at a time" (15 R. 74-75).

Petitioner Eleazar's boyfriend (Bumgardner) and brother (Jackson) used her telephone to carry out drug transactions (11 R. 137-138). During at least one conversation, she listened on an extension phone

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[3] "R." refers to the record on appeal.

and twice interjected comments in the conversation (15 R. 108-109). During one call, she told Jackson that "Ronnie got all that stuff" (14 R. 91), and later in the same call Bumgardner told Jackson that "Teresa [Eleazar] went by and picked it up" (14 R. 92-93). During another call, petitioner Jackson directed co-defendant Hines to give money to Bumgardner, "because I'm gonna get them to wire me the money" (15 R. 80, 81). Three days later, Jackson instructed his sister how to wire money to Jacques Provost in North Carolina and told her "if you got to leave a name, just give some, you know, anonymous name, you know" (15 R. 102).

2. After the verdicts were returned, petitioners learned that during trial one of the jurors had become concerned by a courthouse incident and had reported the matter to the district judge, who, after investigation, had reported back to the juror (83-1138 Pet. App. 13a-16a). At the request of counsel (*id.* at 11a), the district court conducted a hearing on September 30, 1982, attended by all petitioners (except Bumgardner, who had been arrested on other charges the night before) and their counsel (9/30/82 Tr. 5). The testimony at that hearing showed that, during trial, an FBI agent investigating another matter attempted to photograph some of the defense witnesses as they left the courthouse at the end of the day (83-1138 Supp. App. 17a; 83-1138 Pet. App. 20a, 25a-26a). To focus his camera, he aimed it at several people, including some jurors, as they left the courthouse (83-1138 Pet. App. 26a).

One of the jurors, Bryant Deaton,[4] observed the photography, noted the license number of the pho-

[4] Juror Deaton's name was misspelled "Denton" by the court of appeals (83-1138 Supp. App. 17a).

tographer's car, and returned to the courthouse to report the incident (83-1138 Pet. App. 19a-20a, 30a). The judge called Deaton into chambers, where Deaton reported the incident in the presence of the judge's clerk and gave the judge the piece of paper with the license plate number (*id.* at 20a, 30a-31a, 35a). After the juror's departure, the district judge called the FBI, described the events, and gave the agents the license number provided by Deaton (*id.* at 20a, 24a-25a). The investigating agent determined that another agent was responsible for the photography and reported that fact to the district judge early the following morning (*id.* at 25a-26a).

When juror Deaton arrived in the jury room the following morning, he expressed his concern about the incident to the foreman (9/30/82 Tr. 105). The district judge then called Deaton to his chambers to notify him of the result of his investigation. The district judge told Deaton that he had determined who had been taking the photographs; that the photography had not been aimed at the jurors and that Deaton should not consider it to have been directed at him or at any other juror; and that the judge would prefer not to describe the background of the incident in detail at that time but would do so at the end of trial (83-1138 Pet. App. 20a, 31a). When juror Deaton returned to the jury room, he recounted the incident to the other jurors and reported that the judge "had assured [him] that everything was okay" (*id.* at 32a, 36a). The incident was not discussed or mentioned again among the jurors during trial or deliberations (*id.* at 32a, 34a, 36a).

Juror Deaton testified that when he initially saw the photographer he was apprehensive, thinking that someone might be photographing the jurors in order to retaliate if they returned a guilty verdict (83-1138

Pet. App. 36a, 40a). After talking to the district judge the following morning, however, "[i]t was no longer a concern for me * * *. I didn't think anymore about it" (*id.* at 34a). Juror Deaton affirmed that the incident did not have "any effect whatsover on [his] verdict" (*ibid.*). Nor, in his opinion, did the incident have any impact on the deliberations of the jury (*id.* at 32a-33a). As Deaton explained, he assumed "after the judge had said that everything was okay that it was something to do with either the SBI or the FBI or some law enforcement agency" (*id.* at 42a). It was to satisfy his curiosity about the incident and the accuracy of his assumption that he asked the judge from the jury box for more details about the photography incident after the jury had rendered its verdict (*id.* at 13a, 34a).

At the conclusion of the hearing, the district court issued written findings and concluded that the deliberations of neither juror Deaton nor other members of the jury had been prejudiced as a result of the incident (C.A. App. 297-299).

3. On appeal, petitioners raised many of the same issues presented here. The court of appeals rejected their challenges and affirmed the convictions. In particular, it held that (1) the federal wiretap evidence was not tainted by allegedly illegal consensual monitoring of phone calls by state police officers (83-1138 Supp. App. 4a-6a); (2) petitioner Jackson, after excluding the time consumed by resolution of his pretrial motions and his request for continuances, was tried within the 120-day limit of the Interstate Agreement on Detainers Act (IAD), 18 U.S.C. App. § 2, Art. IV (83-1138 Supp. App. 8a-9a); (3) there was a preponderance of evidence independent of the co-conspirator statements to show that petitioners Bumgardner and Eleazar were members of the con-

spiracy (*id.* at 11a-12a); (4) the evidence of petitioner Eleazar's participation in the conspiracy was sufficient to support her conviction (*id.* at 16a-17a); and (5) petitioners had received the hearing to which they were entitled regarding the possible prejudicial impact of the photography incident, and the district court's finding that the episode had not prejudiced petitioners was not clearly erroneous (*id.* at 17a-18a).

ARGUMENT

1. All petitioners except Jackson contend (83-1138 Pet. 8-29; 83-6086 Pet. 5-8; 83-6092 Pet. 16-22) that the photography incident deprived them of their right to an impartial jury. They also argue that the district judge's ex parte contact with juror Deaton deprived them of various constitutional and statutory rights, and that the district court's post-trial hearing inadequately resolved those claims.[5] We submit that, regardless of petitioners' claims of constitutional injury, they have failed altogether to show any harm flowing from the incident. *Rushen* v. *Spain*, No. 82-2083 (Dec. 12, 1983).[6]

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[5] We note that, in the court of appeals, petitioners assessed the merits of this issue to be so low as to accord it less than one page in their brief (C.A. Br. 71-72). That bare statement of the claim was amplified in their reply brief (C.A. Reply Br. 18-28), to which the government, of course, had no opportunity to respond.

[6] The essence of petitioners' various constitutional claims is that they had a due process right to a mid-trial hearing regarding the trial court's contact with juror Deaton. There was, however, a post-trial hearing on the issue that was attended by all petitioners (except Bumgardner, who had been arrested the night before) and their counsel, and all counsel participated in the cross-examination of the witnesses. Even if it would have been preferable for the court to notify counsel

a. Petitioners have failed, as the district court concluded (C.A. App. 299), to carry their initial burden of showing a deprivation of a right so essential to the integrity of the trial that it renders void their presumptively valid convictions. Petitioners were unable to show that juror Deaton's experience interfered, directly or indirectly, with the jury's deliberations.[7] Deaton's overnight suspicion of foul

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promptly of his exchange with Deaton—when, for example, alternate jurors could have been used if he were found to be prejudiced—the omission is not fundamental here, where Deaton was found not to be prejudiced. Indeed, because petitioners do not claim any prejudice from the judge's ex parte contacts themselves, but only from the juror's misapprehension about the photography incident, it is difficult to see why the post-trial hearing was not an adequate forum to inquire into the incident. See *Rushen* v. *Spain*, slip op. 5 n.5 (Stevens, J., concurring).

The complaint of petitioners Peed and Coddington (83-1138 Pet. 23-24) that they were not given prior notice that the September 30 sentencing hearing would also be a hearing into the photography incident is unavailing. They argue that, because of the lack of notice, they were unable to prepare for the hearing by collecting factual information. The simple answer to this contention is that, had the judge convened a mid-trial hearing as petitioners seem to prefer, they would have had no greater opportunity to prepare.

[7] The district court's factual findings regarding its ex parte communications with Deaton and their effect on juror impartiality are entitled to a presumption of correctness. See *Rushen* v. *Spain*, slip op. 6. Cf. *Rogers* v. *United States*, 422 U.S. 35, 40-41 (1975) (Court concludes that ex parte contact by judge with deliberating jurors is not harmless error because of "the nature of the information conveyed to the jury" and the "manner in which it was conveyed"; error was compounded by the fact that the trial court did not hold any hearing into the effect of its communication with the jurors and "petitioner's counsel was not aware of the court's communication until after * * * the petition for certiorari" was granted).

play was based on his erroneous inference from FBI conduct wholly unrelated to him. As Deaton testified, and as the district court found (C.A. App. 298-299), the court's assurance that the photography had nothing to do with him or anyone else on the jury completely alleviated Deaton's concern and the incident had no effect on his deliberations or decision as a juror. Like the juror in *Spain*, Deaton "turned to the most natural source of information—the trial judge" —to report his observations (*Rushen* v. *Spain*, slip op. 7). And, as in *Spain*, the district judge "did not discuss [with the juror] any fact in controversy or any law applicable to the case" (*ibid.*). The conclusion that Deaton was not biased by the photograph incident or his contact with the judge is amply supported by the record.[8]

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[8] Petitioner Eleazar argues (83-6092 Pet. 21) that the trial court's failure to give juror Deaton a complete explanation of the FBI's activities inevitably contributed to bias and that this Court disapproved of such a partial communication in *Remmer* v. *United States*, 350 U.S. 377, 379 (1956). This argument overlooks a critical difference in the facts of the two cases. In *Remmer*, the juror had been approached by a third party who suggested he make a deal with the defendant. Thereafter, the juror approached the trial court, who contacted the FBI, who in turn interviewed the juror (350 U.S. at 380-381). The juror, however, was never informed of the outcome of the FBI investigation (*id.* at 382). This Court remanded the case for a new trial because this course of events left the juror "a disturbed and troubled man * * * subjected to extraneous influences to which no juror should be subjected" (*id.* at 381-382). The facts of this case hardly parallel *Remmer*. Whatever Deaton initially feared, he knew he had no role in and could not be suspected of any wrongdoing. And once he was assured that the incident did not concern him or the other jurors in any way, the possibility of bias was removed.

Nor did petitioners sustain their burden of showing that the other jurors were prejudiced or influenced by the incident. If any of the other jurors saw the original photography, none of them brought it to the attention of the judge. Juror Deaton returned alone to the courthouse to report his concerns. The next morning, before talking to the district judge, Deaton discussed the matter only with the jury foreman (9/30/82 Tr. 105). Not until he returned from the judge's chambers did he tell the other jurors about the incident, and at that point he also conveyed the judge's assurance that it did not concern any of them in any way (83-1138 Pet. App. 32a, 34a, 36a). Thus, none of the other jurors experienced any period of doubt before the matter was resolved.

b. Petitioners contend (83-1138 Pet. 22-29; 83-6086 Pet. 7-8; 83-6092 Pet. 16-22) that the post-trial hearing into the photography incident was defective and did not comport with the requirements of *Remmer* v. *United States*, 347 U.S. 227, 230 (1954). In particular, they argue that the district court erroneously imposed the burden of proof on them rather than on the government and that the district judge's failure to call all the other jurors deprived petitioners of the opportunity to test the impartiality of the whole jury.[9]

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[9] Petitioners also assert (83-1138 Pet. 24-25) that the need for the district judge to relate the circumstances of the ex parte contact required him to recuse himself, because only in that way could he be properly cross-examined. But, while a judge does not properly act as a witness in a trial at which he presides, that principle does not bar him from relating the historical facts surrounding his mid-trial communication with a juror. Because there "is scarcely a lengthy trial in which one or more jurors does not have occasion to speak to the trial judge about something" (*Rushen* v. *Spain*, slip op. 4), forbid-

i. Petitioners' argument that they were required improperly to bear the burden of proof misapprehends *Spain*, *Remmer*, and *Smith* v. *Phillips*, 455 U.S. 209 (1982). A defendant claiming juror impartiality is entitled to a hearing in which he "has the opportunity to prove actual bias." *Phillips*, 455 U.S. at 215; *Rushen* v. *Spain*, slip op. 5 n.3. Some circumstances, however, justify a presumption of bias or prejudice.[10] But the burden shifts to the government to show beyond a reasonable doubt that the error was harmless only after the defendant has established actual or presumptive prejudice. *Remmer*, 347 U.S. at 229.

The facts in this case do not meet the standards for presumptive prejudice as defined by this Court, nor have petitioners shown actual prejudice. This case does not resemble *Remmer*'s attempted bribery of a juror by a third party. Indeed, it involves no third-party contact at all. Just as importantly, the photography incident did not involve a matter pending before the jury. And, no extraneous outside pressures were brought to bear on Deaton or other mem-

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ding a judge to relate these details unless he is called as a witness before another jurist would ignore the "day-to-day realities of courtroom life" (*ibid.*). In any event, every fact related by the judge in this case was corroborated by the FBI agent and juror Deaton, both of whom were extensively cross-examined. Moreover, none of the trial attorneys showed the least reluctance to speak candidly to the judge about his actions (9/30/82 Tr. 174).

[10] In *Remmer*, where a third party had suggested to a juror that he could profit financially by making a deal with the defendant, the court held that "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is * * * presumptively prejudicial" (347 U.S. at 229).

bers of the jury.[11] Because the facts of this case cannot be considered to raise a presumption of bias on the part of Deaton or other members of the jury, petitioners bore the burden of making an initial showing of actual prejudice; as demonstrated above, they failed to shoulder it.

ii. At the conclusion of the examination of the witnesses at the post-trial hearing, defense counsel requested the district judge to call the other jurors to ascertain the impact of the incident on them (9/30/82 Tr. 169-170). Contrary to petitioners' contention, the district court did not deny their request outright. He instead reserved the decision whether to call additional witnesses until after argument from counsel (*id.* at 171). The thrust of counsel's argument to the district court was that a post-trial hearing skews the resolution of the prejudice issue (*id.* at 174), that the government had engineered the photography incident (*id.* at 176, 179, 182, 184), that the whole affair was highly prejudicial and unfair (*id.* at 175, 177, 179-180, 185-186), and that the government had failed to carry its burden (*id.* at 173, 175). Only the lawyer of the one petitioner who does not present the question to this Court (see 83-1155 Pet. at i) suggested the need to call the other jurors, and even his asserted need for those witnesses was diminished by his claim that, at the outset, prejudice is presumed in a case like this (9/30/82 Tr. 174-175). No other counsel at the hearing

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[11] The only "outside influence" on Deaton was created by the juror himself when he misinterpreted the photography incident. The issue at the post-trial hearing was not whether Deaton had been biased by the photography, but whether he harbored any ill will toward petitioners after he received the judge's assurance that the incident had nothing to do with him or the jury.

or following issuance of the court's final order pressed the need to examine the other 13 jurors. The district court's ruling on this issue, therefore, warrants no futher attention by this Court.

In any event, the district court explained its decision not to call additional witnesses. It found Deaton to be a highly credible witness. Referring to Deaton's assertion that the incident was not discussed during the trial or the jury's deliberations, the court found it "inconceivable * * * that any of the other jurors, not directly involved in the incident, could have been prejudiced or influenced in any way" (C.A. App. 299). In these circumstances, the trial court acted well within its discretion in refusing further probing of the jury.

2. Petitioner Jackson contends (83-1155 Pet. 10-23) that the court of appeals erred in concluding that he waived the 120-day limitation of the Interstate Agreement on Detainers Act (IAD), 18 U.S.C. App. § 2, Art. IV(c), when he requested that he be treated in a manner inconsistent with that time limitation by seeking continuances and joining with the other petitioners in several pretrial motions. He cites no authority to the contrary, however, and his position is not supported by reason or the legislative history of the Act.

The government brought petitioner to North Carolina for trial from Florida, where he was in custody, by detainer. He arrived in North Carolina on April 13, 1982, and trial commenced 133 days later, on August 24, 1982. On April 26, 1982, petitioner moved the district court to allow him to adopt the motions of his co-defendants, the hearings on which consumed 16 days (83-1138 Supp. App. 8a). In addition, peti-

tioner requested singly, or joined in the motions of co-defendants for, continuances which consumed another 50 days (*id.* at 9a). In this Court, as below, petitioner contests the assertion that he sought these continuances (83-1155 Pet. 14). But, as the court of appeals noted, exclusion of the 16-day period required to resolve the pre-trial motions would by itself bring petitioner's trial well within the 120-day limitation period (83-1138 Supp. App. 9a).[12]

Petitioner argues (83-1155 Pet. 19-21) that the court of appeals' analogy to the Speedy Trial Act of 1974, 18 U.S.C. 3161(h), is inconsistent with congressional intent. This claim is, however, refuted by the legislative history of the IAD. The IAD was a legislative response to the Court's ruling in *Dickey* v. *Florida*, 398 U.S. 30 (1970), which held that a state must make a diligent, good faith effort to try a defendant within a reasonable time even when he is serving a sentence in a federal prison outside the state. The

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[12] On facts closely analogous to those of the present case, the Second Circuit recently rejected a claim under the IAD identical to the one presented by petitioner in this Court. *United States* v. *Scheer*, No. 83-1308 (2d Cir. Feb. 24, 1984). In that case, the court of appeals noted that "[t]he defendant asked for additional time to procure an attorney, to suppress evidence and to procure a state transcript. He requested continuances based on the unavailability of his witnesses and moved that the court allow these witnesses to be subpoenaed" (slip op. 2001). Finding that "it is appropriate to exclude all those periods of delay occasioned by the defendant" (slip op. 2000) which in that case amounted to 148 days, the court of appeals concluded that the defendant's rights under the IAD were not violated (*id.* at 2001-2002) (citing cases). Although the defendant had awaited trial a total of 249 days, after deducting the 148 days of delay "that defendant requested * * * solely for his benefit," the court found that he was "brought to trial within the statutory [120-day] time period" (slip op. 2000).

IAD was enacted principally to "afford defendants in criminal cases the right to a speedy trial and diminish the possibility of convictions being vacated or reversed because of a denial of this right." S. Rep. 91-1356, 91st Cong., 2d Sess. 2 (1970). Because the IAD and the Speedy Trial Act of 1974 are both intended to insure speedy trials, they should not be interpreted in a discordant manner. *United States* v. *Odom*, 674 F.2d 228, 231 (4th Cir.), cert. denied, 457 U.S. 1125 (1982). See also *United States* v. *Stewart*, 311 U.S. 60, 64-65 (1940) (statutes having same purpose should be construed together). The court of appeals, therefore, properly concluded that any period lawfully excluded under 18 U.S.C. 3161(h) will generally qualify for exclusion under the "good cause" provision of IAD § 2, Art. IV(c) (83-1138 Supp. App. 8a; *Odom*, 674 F.2d at 231).

Petitioner's further argument that the time provisions of the IAD must be explicitly waived in open court [13] and cannot be waived by his own actions is not supported by the cases on which he relies [14] and

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[13] Petitioner's suggestion (83-1155 Pet. 17) that any waiver here does not comply with the "in open court" provision of the IAD because his motions for continuances and other relief were written is an overly literal interpretation of the Act. The language in the IAD relied upon by petitioner was meant to prohibit ex parte and sua sponte continuances; it was not designed to require the personal presence of the parties to discuss the excludability of time. *Odom*, 674 F.2d at 231.

[14] Petitioner's reliance on *United States* v. *Mauro*, 436 U.S. 340 (1978), is misplaced. In a companion case to *Mauro*, this Court dismissed charges that were not tried within the 120-day limitation of the IAD, but the defendant in that case, unlike petitioner, had made repeated requests for a speedy trial, had taken no action that would delay trial, and had objected to other efforts to continue or delay trial. 436 U.S. at 346-347, 364-365.

is contrary to common sense. Without citing any authority, petitioner claims (83-1155 Pet. 17-19) that his own acts that are inconsistent with the IAD protection of his speedy trial rights cannot be construed as an implicit waiver of the IAD time limitation. But petitioner's argument, taken to its logical conclusion, would give a defendant the power to delay his trial past the 120-day limitation period with pretrial motions and requests for continuances, and then demand dismissal of all charges because of that delay. Such a result is clearly inconsistent with the legislative objective of "diminish[ing] the possibility of convictions being vacated or reversed because of a denial of [a speedy trial]." S. Rep. 91-1356, *supra*, at 2. If petitioner objected to the delay of his trial, he should, like the defendant in *United States* v. *Mauro*, 436 U.S. 340 (1978), have interposed an explicit objection on speedy trial grounds so that the trial court could consider it. *Odom*, 674 F.2d at 231-232.

3. Petitioner Eleazar contends (83-6092 Pet. 14-15) that evidence seized in the federal wiretap should have been excluded because that wiretap was instituted on the basis of information gained from the improper monitoring of telephone calls by state officers. Petitioner's argument founders, however, on both state and federal law.

First, as the court of appeals noted, while a municipal police officer in Florida has limited authority to conduct an investigation outside city limits (*Wilson* v. *Florida*, 403 So.2d 982, 984 (Fla. 1980)), such an investigation is within the officer's authority if the crime under investigation took place within the city limits (83-1138 Supp. App. 5a). In this case, Jacksonville Beach police officers monitored calls made by their informant to Jacques Provost's home

outside city limits. However, because the officers were investigating a double murder that occurred in Jacksonville Beach, which Jacques Provost was suspected of having ordered, the consensual monitoring of the telephone calls was legal under state law (83-1138 Supp. App. 5a).

Second, whether evidence is admissible in a federal court is a question of federal law. See, *e.g.*, *Elkins* v. *United States*, 364 U.S. 206, 223-224 (1960); *United States* v. *Zemek*, 634 F.2d 1159, 1164 n.4 (9th Cir. 1980), cert. denied, 450 U.S. 985 (1981); Fed. R. Evid. 402. Federal law clearly permits the admission of consensual wiretap evidence irrespective of whether it conforms to state wiretap standards. See, *e.g.*, *United States* v. *Adams*, 694 F.2d 200, 201 (9th Cir. 1982), cert. denied, No. 82-1427 (June 13, 1983); *United States* v. *Neville*, 516 F.2d 1302, 1309 (8th Cir. 1975). Because the monitoring of the telephone calls at issue would have been legal under federal law (18 U.S.C. 2511(2)(c)), admission of the wiretap evidence in a federal trial was wholly uncontroversial.

4. Petitioner Eleazar also argues (83-6092 Pet. 15-16) that the evidence supporting her conviction was insufficient.[16] Both courts below have rejected this fact-bound claim and the question does not warrant further consideration by this Court. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2

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[16] **Petitioner also asserts (83-6092 Pet. 12-13) that there was insufficient evidence independent of her co-conspirators' statements showing the existence of the conspiracy and her participation in it. This fact-bound contention is without merit. There was ample independent evidence showing petitioner Eleazar's participation in the conspiracy—largely derived from recordings of petitioner herself. See n.16, *infra*.**

(1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[16]

5. Finally, petitioners Bumgardner and Eleazar complain that the court of appeals' Local Rule 19, which requires the filing of one brief for each side in a consolidated case, violates due process (83-6086 Pet. 4; 83-6092 Pet. 9).[17] We have substantial reservations about the wisdom of this rule, but it does not

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[16] In any event, the record in this case amply supports petitioner Eleazar's conviction. See 83-1138 Supp. App. 16a-17a. For example, in one telephone call petitioner told Bubba Jackson that "Ronnie got all that stuff" (*id.* at 12a, 16a). Later in the same call, Bumgardner informed Jackson that "Teresa [petitioner] went by and picked it up," where "it" referred to cocaine (*ibid.*). During another call, Jackson told Hines to give money from a drug sale to Bumgardner because Bumgardner and petitioner would be wiring money to him. Three days later, Jackson instructed petitioner how to wire money under an assumed name. Although petitioner testified at trial and offered her own version of these events, the jury apparently did not accept her story (*id.* at 17a).

[17] Rule 19 of the Rules of the United States Court of Appeals for the Fourth Circuit provides:

> Related appeals or petitions for review will be consolidated in the Office of the Clerk, with notice to all parties, at the time a briefing schedule is established. One brief shall be permitted per side, including parties permitted to intervene, in all cases consolidated by court order, unless leave to the contrary is granted upon good cause shown. In consolidated cases lead counsel shall be selected by the attorneys on each side and that person's identity made known in writing to the Clerk within seven (7) days of the date of the order of consolidation. In the absence of an agreement by counsel, the Clerk shall designate lead counsel. The individuals so designated shall be responsible for the coordination, preparation and filing of the brief and appendix.

follow that it is unconstitutional or that its application in this case merits review by this Court.

The courts of appeals are authorized to regulate their practice "in any manner not inconsistent with [the Federal Rules of Appellate Procedure]" (Fed. R. App. P. 47), and the court of appeals' rule is not inconsistent with any provision of the rules.[18] The rule is not calculated to preclude the presentation of issues or arguments by individual appellants, but rather to encourage such litigants to keep their appellate pleadings within manageable limits. The record in this case, moreover, demonstrates that the rule did not in fact preclude the petitioners from presenting their various arguments before the court of appeals.

Following entry of the lower court's order consolidating the appeals in this case, all counsel for the various petitioners joined in a motion to enlarge the length of the brief from 50 to 75 pages. That motion was granted by the court. Counsel apparently encountered some difficulty in compiling the consolidated brief, however, and two briefs were in fact submitted to the court of appeals, a 72-page brief and a 128-page brief. The latter, according to counsel, "consist[ed] of the good faith presentation of issues by officers of this court as if they were representing their clients without the inhibitions of * * * Local Rule 19" (Second Motion to Enlarge Length of Brief at 4). The court was not informed at this time that the shorter brief omitted any important arguments

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[18] Rule 28(i) of the Federal Rules of Appellate Procedure provides that, in cases involving multiple appellants or appellees, "any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs."

on behalf of individual petitioners, and the motion to file the 128-page brief was denied.

Thereafter, several reconsideration motions were filed with the court of appeals. These motions, for the first time, suggested that the 72-page brief did not contain certain arguments various petitioners desired to present to the appellate court. See Appellant Gary J. Peed's Motion for Reconsideration at 3-4; Appellant Jeffrey Craig Bumgardner's Motion for Reconsideration at 3-4; Appellant James C. Coddington's Motion for Reconsideration at 3-4. Apart from citing the general "difficulty of filing a joint brief with six parties' interests being represented," [19] however, the motions gave no reasons why the court should further extend its 75-page limitation on the consolidated brief. In particular, although the various motions alleged that counsel for petitioners were "unaware" that certain arguments had been deleted from the shortened brief (Reconsideration Motions for Peed, Bumgardner and Coddington at 4), the papers filed with the court did not explain why counsel were not cognizant of the contents of a brief supposedly prepared under their direction. Moreover, the various motions did not explain why petitioners did not utilize the three remaining pages of briefing left to them under the court's prior order to bring at least some of the "omitted" issues to the court's attention. Accordingly, the court denied the reconsideration motions.

Thus, the course of events in this case does not show that the operation of Local Rule 19 denied petitioners any due process right to present their arguments. Petitioners never availed themselves of their

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[19] Motion for Reconsideration at 3 filed by lead counsel for the appellants.

right under Rule 19 to seek permission to file separate briefs upon a showing of "good cause," nor did they explain in timely fashion what specific prejudice would be incurred by filing within the 75-page limit sought and granted in their initial motion. Rather, petitioners simply refused to present their omitted arguments to the court of appeals on any but their own terms. In these circumstances, their complaint regarding the local rule does not merit review by this Court.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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